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13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA - OAKLAND DIVISION
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DEBORAH J. THOMAS

Plaintiff,

vs.

THE WALT DISNEY COMPANY,
WALT DISNEY STUDIOS, DISNEY
PRESS, PIXAR ANIMATION
STUDIOS, WALT DISNEY FEATURE
ANIMATION, WALT DISNEY
PICTURES, DISNEY ENTERPRISES,
INC. and DOES 1 through 100,
Inclusive,

Defendants.

No. CV 07-04392 CW

**PLAINTIFF'S MEMORANDUM OF
POINTS AND AUTHORITIES IN
OPPOSITION TO MOTION TO
DISMISS FIRST AMENDED
COMPLAINT**

Date: January 31, 2008
Time: 2:00 p.m.
Dept: #2
Judge: Hon. Claudia Wilkin

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I. INTRODUCTION

Deborah Thomas ("Plaintiff" or "Thomas") properly states a claim for copyright infringement and unfair competition based on Defendants' use of her story submission "Squisher the Fish" to create the movie "Finding Nemo" and various derivative products based on that movie. Defendants' infringement is continuing and Thomas' claims address only those acts of infringement which occurred within the three years prior to the filing of her complaint. Thus, her complaint is not barred. Also, Defendants' argument that this Court should dismiss based on lack of similarity is without merit given the overwhelming similarities between "Squisher" and "Nemo." Finally, Thomas' unfair competition claim is not preempted because it arises out of Defendants' breach of a confidential relationship and has been brought within the four year limitations period for unfair competition claims.

II. FACTS

Thomas is not a sophisticated producer or member of the entertainment industry. She is a layperson who became familiar with fish as a result of being a diver and fish collector for many years. Thomas created an original literary work about a young fish called "Squisher the Fish." The story follows Squisher from the time he was a hatchling to his first day at a cleaning station. Squisher is inquisitive and explores the reef that he makes home. While he is out with friends, he is captured by a diver and taken to an aquarium tank.

Thomas submitted her unique and novel story to Defendants, for the purpose of developing a movie, book, or other commercial application. Thomas trusted Walt Disney Company and its subsidiaries to evaluate her work, and determine how best to use her story. Defendants accepted and reviewed Thomas' work for nearly three months before returning it, claiming it was their business practice to not accept outside story submissions. Despite this representation, Defendants used the story submitted by Thomas, and incorporated it into a movie entitled "Finding Nemo." At the heart of "Nemo" is Thomas' story about a young inquisitive fish, exploring his reef-home until he

1 is captured by a human diver and placed into an aquarium. Defendants have added to this
2 story, but Thomas' Squisher story is integral to "Finding Nemo."

3 Defendants' use of Thomas' story infringes her copyright, and Defendants have
4 continued to infringe her copyright by subsequent theatrical showings of the movie, DVD
5 and videocassette sales, and the sale of other merchandise based on the movie. Thomas'
6 complaint, filed on May 29, 2007, properly claims infringement for all acts within the
7 previous three years.

8 **III. THOMAS' CLAIMS AGAINST DEFENDANTS' CONTINUING** 9 **INFRINGEMENT WITHIN THE PREVIOUS THREE YEARS IS TIMELY**

10 The statute of limitations for copyright infringement is three years. 17 U.S.C. §
11 507. In a case of continuing infringement, an action may be brought for all acts that
12 occurred within the three years preceding the filing of the suit. *See Roley v. New World*
13 *Pictures*, 19 F.3d 479, 481 (9th Cir. 1994). Thomas' complaint was filed on May 29,
14 2007. Thus, all acts of infringement by Defendants occurring after May 29, 2004 to the
15 present are not barred. On information and belief Plaintiff contends that the movie
16 continued to be shown to the public in theaters domestically and internationally after May
17 29, 2004. Each such theatrical showing constitutes a new act of infringement. Further,
18 as alleged in Plaintiff's complaint, Defendants have reaped benefits since May 29, 2004
19 from sales of DVDs of the "Finding Nemo" movie as well as from sales of video games
20 based on the movie. On information and belief, since May 29, 2004, Defendants have
21 sold other merchandise based on the "Finding Nemo" movie, each such sale constituting a
22 separate act of infringement.

23 **A. Continued showings of a movie in theaters and continued sales of DVDs** 24 **are continuing wrongs and are not deemed a single act of infringement**

25 Defendants incorrectly argue that subsequent showings of a movie or subsequent
26 sales of DVDs after the initial release dates cannot be treated as separate acts of
27 infringement. The cases cited by Defendants do not hold that all theatrical showings of a
28 movie or all sales of DVDs are to be treated as one act of infringement occurring on the
initial release date. In *Roley*, the Court held that a plaintiff cannot include claims outside

1 of the three year period in a case of continuing infringement, but permitted claims for acts
 2 of infringement occurring within the last three years preceding the filing of suit. Contrary
 3 to the argument of Defendants, the *Roley* court did not hold that the initial release date of
 4 a movie was the one and only date of accrual of the statute for copyright infringement.
 5 What the *Roley* Court did find was that the plaintiff in that case had failed to introduce
 6 any evidence of actionable conduct within the three year limitations period. *See Roley*
 7 *supra* at 482. That holding is inapposite to the case at bar because of the alleged acts of
 8 infringement within the limitations period. Similarly, *Kourtis v. Cameron*, 419 F.3d 989,
 9 999-1000 (9th Cir. 2005) involved an infringement suit based on the *Terminator* movie.
 10 The Court held that although the initial act of infringement was outside the limitations
 11 period, the complaint alleged several acts of continuing infringement. Thus, the
 12 complaint was not barred in its entirety.

13 Disney's continued display, distribution and sale of Finding Nemo in theaters and
 14 on DVD is a continuing infringement, and Thomas' claim properly seeks damages only
 15 for those acts occurring within the three years prior to her complaint. *Kourtis*, 419 F.3d
 16 at 999-1000. Continued sales of an infringing product are treated as continuing acts of
 17 infringement and not as a single act. *See Taylor v. Meirick*, 712 F.2d 1112 (7th Cir.
 18 1983) (continued sale of maps that infringed plaintiff's copyright treated as a continuing
 19 wrong). The initial showing of the copied work is not a completed wrong but simply the
 20 first step in a course of wrongful conduct that continues until the last copy is sold. *Id.* at
 21 1119. *See also Danjaq LLC v. Sony Corp.*, 263 F.3d 942 (9th Cir. 2001) (re-release of
 22 film by DVD many years after theatrical release treated as a separate infringement).
 23 Because plaintiff has alleged claims of infringement arising out of the continued
 24 theatrical showing of the movie, and continued sales of the DVD, she has stated a timely
 25 claim.

26 **B. Sales of video games, toys, live performances, books and merchandise**
 27 **within the limitations period are not barred**

28 Defendants suggest that Plaintiff waited too long to assert copyright claims arising
 out of the sale of video games, toys, books and other merchandise, as well as live

performances, but offer no evidence to establish that none of these works was created, distributed, sold or performed within the three year limitations period or that Plaintiff is otherwise untimely in asserting her claim. Defendants contend merely that a "reasonable person" would have asserted these claims earlier. Absent clear evidence of when these infringements occurred, however, Plaintiff's claims cannot be dismissed as untimely. For purposes of this motion, it must be presumed that Thomas' allegations of sales and performances within the limitations period are correct.

To the extent Defendants contend that it is inequitable for Plaintiff to have waited until May 2007 to file her infringement claims as to these products, her delay is not extraordinary enough to be barred by the doctrine of laches. In *Danjaq*, 263 F.3d 942, the Court found that Plaintiff's infringement claims as to DVD releases of James Bond films were barred by laches because Plaintiff had delayed asserting the claims some 16 and 19 years after the release of the movies! Here, Thomas asserted infringement claims within the limitations period as to these products and within four years of the original release date of the movie, not the egregious amount of time present in *Danjaq*. The cases cited by Defendants, *Polar Bear Productions, Inc. v. Timex Corporation*, 384 F.3d 700 (9th Cir. 2004) and *Bridgeport Music*, 2006 WL 3720348 at *9 (M.D. Tenn. 2006), stand simply for the proposition that a cause of action accrues when the plaintiff reasonably discovers the infringement. These cases do not support defendants' argument that plaintiff's delay of four years was unreasonable as a matter of law or that defendants have been prejudiced in any manner by the delay.

IV. THOMAS' STORY AND FINDING NEMO ARE SUFFICIENTLY SIMILAR TO STATE A CLAIM FOR COPYRIGHT INFRINGEMENT

Access by defendants to plaintiff's original story for nearly three months has been established. In evaluating defendants' motion to dismiss for failure to state a claim on the issue of similarity, the law requires that **copying be assumed** and that the motion be denied unless the two works lack any substantial similarity. See *Cory Van Rijn, Inc. v. California Raisin Advisory Board*, 697 F.Supp. 1136, 1138-1139 (1987) (emphasis added). Thus, the issue becomes whether there is anything original in Squisher that is

1 substantially similar to what is contained in Finding Nemo. If there is, Defendants'
 2 motion on substantial similarity fails. *See Cory Van Rijn* at 1139; *Funky Films, Inc. v.*
 3 *Time Warner*, 462 F.3d 1072, 1076 (9th Cir. 2006) (to oppose summary judgment,
 4 plaintiff need only show the existence of a triable issue of fact that Plaintiff's original
 5 material was copied by defendants).

6 The test for substantial similarity involves both an extrinsic test, which is
 7 objective, and an intrinsic test, which is subjective. *Berkic v. Crichton*, 761 F.2d 1289,
 8 1292 (9th Cir. 1985). A plaintiff must establish evidence of both types of similarity, but a
 9 Court can only evaluate the extrinsic prong because the intrinsic test is exclusively the
 10 province of the jury. *Funky Films* at 1078. The extrinsic test focuses on articulable
 11 similarities between the plot, themes, dialogue, mood, setting, pace, characters and
 12 sequence of events in the two works. *Id.* Plaintiff need not show similarity as to each
 13 factor. *See e.g. Olson v. National Broadcasting Co.* 855 F.2d 1446, 1451 (9th Cir. 1988)
 14 (infringement may be found based on substantial similarity of some of the relevant
 15 factors) (citing *Bevan v. Columbia Broadcasting System, Inc.*, 329 F. Supp. 601
 16 (S.D.N.Y. 1971)).

17 Here, Finding Nemo borrows distinct and original expressions of ideas from
 18 Thomas' Squisher the Fish, precluding dismissal for failure to state a claim.

19 Plot, Setting and Sequence of Events:

20 The heart of "Finding Nemo" is the story of a young inquisitive fish that is
 21 captured by a diver and taken away from his coral reef home. This is a story lifted
 22 directly from "Squisher the Fish." Without this distinct and original story, there would be
 23 no Finding Nemo.

24 Both Nemo and Squisher begin by showing the principal characters as an egg
 25 being guarded by a parent. (*See Decl. of Thomas, Exh. B, story submission*). Upon being
 26 hatched, Squisher sets out to explore his neighborhood, the reef. He is amazed by the
 27 bright and colorful surroundings, and the varieties of fish inhabiting the reef. Finding
 28 Nemo similarly opens with Nemo being hatched and setting out to explore his home, the

1 reef, and expressing wonder at the bright and colorful surroundings and the varieties of
2 fish inhabiting the reef. While Defendants attempt to downplay the similarity of both
3 stories taking place on the edge of a reef by pointing to Nemo's "Australian" reef, the
4 action in both stories takes place on the reef and that is the significant element.

5 Squisher progresses with the little fish excited to attend his first day at a cleaning
6 station, a community place to learn and make friends. Squisher is guided by Glen who
7 points out the various fish with a song naming each species. Nemo also experiences a
8 "first day"--at school--during which he joins other fish in the community. Nemo is also
9 taught by another fish, Ray, who shows him the reef and identifies the various fish with a
10 species song.

11 Both Squisher and Nemo are captured by a diver. The depiction of the capture is
12 identical in both stories. Both Squisher and Nemo are with three friends when they find
13 themselves face to face with the looming mask of the diver. In both stories, the characters
14 are standing at the edge of the reef when the diver appears out of nowhere. Both Squisher
15 and Nemo are caught in a net as they try to escape. In Nemo, Marlin freezes with fear.
16 Although fish are never "frozen," this distinctive detail is taken from Squisher where Dot
17 is frozen with fear at facing the diver.

18 Both Squisher and Nemo then are taken to the surface by the diver and observe
19 with wonder what the world is like. Nemo is placed in a clear bag on the boat and is able
20 to observe the sky and the world above the sea. Similarly, Squisher observes the sky and
21 world above the sea. In either story, the fish could have been placed in a container where
22 he could not observe the surroundings above sea level. However, the two stories do not
23 deviate from each other.

24 Squisher was captured for a little boy; Nemo was captured for a little girl.
25 Squisher and Nemo are both taken to an aquarium tank, where both characters initially
26 hide under a rock because they are scared. Eventually, both characters emerge from their
27 rock in the aquarium and are happy to be in the tank. Defendants argue that Squisher
28 does not describe what occurs to him after he is placed in the tank. However, Thomas

1 indicated to Defendants in her submittal that she was working on a follow-up story about
 2 Squisher's life in the tank. As alleged, Defendants chose to take Thomas' story and run
 3 with it. (*See Decl. of Thomas, Exh. A*).

4 There are other scenes in Squisher that are duplicated wholesale in Nemo.
 5 Squisher and Glen are chased by an eel who lunges at them with mouth open, but they
 6 manage to narrowly escape through a hole. This chase scene is duplicated in Nemo, when
 7 sharks chase Marlin and Dory, but the two narrowly escape being eaten as they swim
 8 through a hole. Also, Squisher and his friends play hide and seek before their capture.
 9 Identically, in Nemo, Dory plays hide and seek with the turtles.

10 The similarity of plot elements and setting are even more striking, given that the
 11 sequence of events in each story unfolds in the same manner. Both stories open with
 12 Squisher/ Nemo guarded by protective parents as eggs, and immediately transition to
 13 Squisher/ Nemo inquisitively exploring their home, the reef. Both Squisher / Nemo are
 14 subsequently captured by a diver. Although the Squisher story is shorter than the Nemo
 15 movie, the exact sequence of Squisher remains intact in Nemo. The comparative length
 16 of the original material copied and the infringing material is frequently irrelevant to the
 17 issue of substantial similarity. For example, in an oft-cited case, the similarity with
 18 respect to only one sequence of plaintiff's motion picture (representing only 20% of the
 19 entire film) was found sufficient to constitute substantial similarity. *Universal Pictures v.*
 20 *Harold Lloyd*, 162 F.2d 354 (9th Cir.1947). *See also Iowa State Univ. Research Found.*
 21 *v. American Broadcasting Co.* 463 F.Supp.902 (S.D.N.Y.1978)(defendant's broadcast of
 22 one 12 second segment and one 2 ½ minute segment from plaintiff's film amounted to
 23 sufficient similarity to support a judgment of infringement).

24 Squisher and Nemo follow each other in plot, setting and sequence lockstep until
 25 the end of Squisher the Fish. Moreover, while generic items such as an ocean setting,
 26 underwater creatures, and a diver may be unprotected "scenes a faire," it is Plaintiff's
 27 original plot and arrangement of these elements that have been precisely duplicated by
 28 Defendants. While Defendants have added to plaintiff's Squisher story (e.g., Nemo's

1 father attempting to rescue Nemo from the tank) the fact that defendants' movie is much
2 longer and contains more elements than plaintiff's story is not dispositive of the similarity
3 issue. *See Universal Pictures, supra.*, at 361. It is enough if the part copied by
4 defendants represents a substantial portion of plaintiff's entire work. *Id.* The test is
5 whether the similarity relates to matter that constitutes a substantial portion of plaintiff's
6 work, not whether such material is a substantial portion of defendant's work. *Worth v.*
7 *Sechow & Righter*, 827 F.2d 569, 570 n.1 (9th Cir.1987). Here, the entirety of the
8 fundamental essence and structure of Squisher the Fish is duplicated in Finding Nemo.
9 That the movie contains some material not found in Squisher does not negative the
10 substantial similarity between the two. Nemo's story cannot begin or end without the
11 Squisher story.

12 Characters:

13 Nemo, the principal character of defendants' movie is actually plaintiff's Squisher.
14 Squisher is guarded by his parents until being hatched. Similarly, Nemo is introduced in
15 the movie as an egg, hatched while being carefully guarded by his father.

16 Squisher is curious and inquisitive, so is Nemo. Just as Nemo must be cautioned
17 on his first day of school to be wary of dangers, Squisher is cautioned before his first day
18 at the cleaning station. Moreover, Squisher is described as "king of his world, in this
19 public aquarium" at the end of Plaintiff's story. In copyrighting the artwork for Nemo,
20 Defendants characterized Nemo as "King of the tank." (*See* Req. for Judicial Notice,
21 Decl. of Thomas, Exh. F). Nemo as "King of the tank" is also on "Finding Nemo"
22 merchandise and video games. (*Id.*, Exhs. G, H).

23 A distinctive characteristic of Nemo is his injured fin. This is taken directly from
24 the character Mr. Grubbs in Squisher. Defendants like this characteristic so much they
25 used it twice, having Gill, one of the aquarium fish in Nemo, suffer from the same injured
26 fin.

1 Frankie, the hip loggerhead turtle in Squisher, becomes Crush, the hip loggerhead
2 turtle in Nemo. In fact, Squisher first meets Frankie and Nemo first meets Crush when
3 each is seeking directions.

4 There are other more minor characters duplicated in both stories. Finding Nemo
5 bases the character Ray, the teacher, on Glen. Both teachers educate the main character
6 Nemo/ Squisher on the various types of fish in the sea and show them around the reef.
7 Nemo even has a character named "Squishy," an obvious derivative of "Squisher."

8 While Defendants contend that Squisher's characters are unprotectable because
9 they lack detail, the characters are sufficiently distinctive to be readily identified in Nemo.
10 Squisher's characters are distinguished by physical characteristics (such as a broken fin)
11 by conduct and by attitude (the inquisitive Squisher and the hip Frankie).

12 Dialogue:

13 The characters in Nemo consistently express wonderment over the ocean and its
14 inhabitants throughout the film. Squisher's dialogue also contains amazement of the
15 ocean. For example, Squisher's first thought is "wow," which is also the first word spoken
16 in the film by Marlin. In Nemo, Ray sings a song describing the various species living in
17 the reef. This song is uncannily similar to the song Glen sings in Squisher. The only
18 variance is that Nemo uses the formal names of species such as (porifera) whereas
19 Squisher uses the more familiar (sponges).

20 Finally, the dialogue in each story reflects the theme of friendship. For example,
21 Glen tells Squisher about love and how it makes one feel whole. Dory tells Marlin "when
22 I look at you, I can feel it . . . and I'm home."

23 Theme:

24 Although Defendants contend that "Finding Nemo" is really about the father
25 Marlin, there is no story without Nemo's adventure from when he was a hatchling to when
26 he ended up in the aquarium tank. The theme of that adventure is wonderment for the
27 ocean and undersea life, and personal growth. Similarly, Squisher deals with themes of
28 curiosity and amazement and Squisher's personal growth. Squisher also deals with

1 themes of friendship. The main theme of Marlin and Dory's interaction is friendship. In
 2 fact, Squisher's relationship with Dot is strikingly similar to that of Marlin and Dory as
 3 the film develops.

4 Mood and Pace:

5 As with all of the comparisons, it is always difficult to compare "mood and pace"
 6 between works which are captured in different media (written word versus film). *See*
 7 *Idema v. Dreamworks, Inc.*, 162 F.Supp.2d 1129, 1185 (C.D.Cal. 2001). Nevertheless,
 8 the similarity here is significant. In an article on Disney's website, it is pointed out that
 9 the mood of the Nemo story was originally dark. (*See* Req. for Judicial Notice, Decl. of
 10 Thomas, Exh. D). However, the mood of Nemo ultimately duplicates that of Squisher. A
 11 happy, light children's tale. The mood of Squisher is one of wonderment for the ocean
 12 and its inhabitants, which is duplicated by Nemo. The Squisher story follows the birth
 13 and growth of Squisher until his capture by a diver. Nemo is paced to follow the birth
 14 and growth of Nemo until his capture.

15 The original and distinct elements in Squisher that are duplicated in Nemo, down
 16 to the manner in which the stories unfold, preclude dismissal for failure to state a claim.

17 **V. THOMAS' UNFAIR COMPETITION CLAIM IS NOT PREEMPTED**

18 Thomas' state law claim of unfair competition is based on the breach of a
 19 confidential relationship that arose out of the submission of her story to Defendants and is
 20 not preempted by copyright law. Thus, Thomas' unfair competition claim must be treated
 21 separately from her copyright infringement cause of action, and is governed by California
 22 Bus. and Prof. Code § 17200 and other California law.

23 State law claims are not preempted if they do not assert rights that are "equivalent"
 24 to those protected by the Copyright Act. *See Kodadek v. MTV Networks, Inc.* 152 F.3d
 25 1209, 1212 (9th Cir. 1998). Thomas' unfair competition claim is not equivalent to her
 26 infringement claim because the former requires proof of an additional element not
 27 required as an element of infringement liability--i.e., breach of confidence. That extra
 28

1 element makes the unfair competition claim qualitatively different from the infringement
2 claim. *See Goldberg v. Cameron*, 482 F.Supp.2d 1136, 1151 (N.D. CA 2007).

3 It is well established that a breach of confidence claim is not preempted by
4 copyright law. *See e.g. Balboa Ins. Co. v. Trans Global Equities*, 218 Cal.App.3d 1327,
5 1350 -1351 (1990)(holding an unfair competition claim based on breach of confidence is
6 not preempted by copyright law). Defendants do not dispute this principle. They argue
7 only that taking Thomas' allegations as true, her claim of breach of confidence is legally
8 incompetent as a matter of law. The law holds otherwise.

9 An actionable breach of confidence arises when an idea, whether or not
10 protectable, is offered to another in confidence, and is received by the offeree in
11 confidence, with the understanding that it will not be disclosed to others, and will not be
12 used by the offeree for purposes beyond the limits of the confidence without the offeror's
13 permission. *See Faris v. Enberg*, 97 Cal.App.3d 309, 323 (1979). Though a confidential
14 relationship will not be created from the bare submission of an idea to another, evidence
15 of a confidential relationship may be inferred from proof that the material submitted was
16 protected by reasons of novelty or elaboration. *Id.* Also, proof that the plaintiff offered
17 her idea upon condition of confidence and an understanding that payment would be made
18 upon use, will suffice to establish a confidential relationship. *Id.* at 322.

19 Thomas alleges that the confidential nature of her submission was communicated
20 to defendants. (*See* First Amended Complaint ¶ 21, "Defendants knew or should have
21 known that Plaintiff's story submission was in confidence...") An explicit communication
22 or particular method of notice that her submission was in confidence is not required by
23 the case law. Communication of the confidentiality of a submission can be inferred by
24 proof that the material submitted was protected by novelty or elaboration. *See Farris*, 97
25 Cal.App.3d at 323. Courts have analogized breach of confidence with trade secret
26 misappropriation, and have held that no particular form of notice of confidentiality is
27 required. *See Thompson v. California Brewing Company*, 150 Cal.App.2d 469, 474
28 (1957). The issue is whether objective circumstances demonstrate that the recipient knew

1 or a reasonable recipient would have known that the submitted information was a novel
2 idea and constituted a disclosure made in confidence. *Id.*

3 Here, Thomas' story, "Squisher the Fish," was detailed and novel. She submitted
4 her original work to Defendants in an envelope labeled "submission," with a cover letter
5 communicating to Defendants that her story was original and novel. (See FAC ¶ 18-21;
6 Decl. of Thomas, Exh. A). Even in the absence of an explicit request to maintain
7 confidentiality, the novelty of "Squisher the Fish" and the circumstances of its submission
8 support an inference that the submission was made in confidence. *See Thompson*, 150
9 Cal.App.2d at 474 (denying demurrer where plaintiff alleged submission of novel idea
10 without any indication submission made in confidence).

11 Thomas also communicated an understanding that use of her story would result in
12 payment and proposed working jointly with defendants. In addition to communication of
13 novelty, submission on the condition of payment upon use has been held to support the
14 finding of communication of a confidential idea. *See Farris supra* at 322. Thomas
15 further alleges that Defendants took advantage of her by using her story without payment
16 for its use. Courts will find a confidential relationship when the parties deal on unequal
17 terms, requiring the weaker party to repose trust and confidence in the stronger party's
18 good faith. *See Davies v. Krasna*, 245 Cal. App. 2d 535,548 (1996).

19 Defendants' argument that they did not understand the confidential nature of
20 Thomas' submission fails for the same reasons. First, Thomas alleges that Defendants
21 knew or should have known the confidential nature of her submission. (See FAC ¶¶ 18-
22 21). Next, Thomas' submission of a novel story idea on the condition of payment upon
23 use supports the inference that Defendants understood the confidential nature of the
24 submission. *See e.g. Farris supra*.

25 Defendants' citation to *Davies* actually supports the inference that a confidential
26 relationship was created. In *Davies*, while the court observed generally that in order for a
27 confidential relationship to be found, either the recipient must have agreed to hold the
28 idea in confidence or there must have been a pre-existing relationship (such as employer-

1 employee), the court ruled there are circumstances in which a plaintiff's idea will be
2 protected even in the absence of such an agreement or relationship. *See Davies* at 548.
3 "Such protection is akin to the traditional protection which equity will afford to a trade
4 secret." *Id.*

5 The inferred understanding of the confidential nature of Thomas' submission
6 preceded Defendants' use and disclosure of her story. *Tele-count Engineers, Inc. v.*
7 *Pacific Telephone and Telegraph Co.*, 168 Cal.App.3d 455, 463 (1995). Accordingly,
8 defendants cannot be heard to argue they had "no opportunity to reject" Thomas'
9 submission. The crux of Thomas' allegations is that Defendants claimed to reject the
10 submission while at the same time they were using it without payment. Defendants held
11 onto plaintiff's story for nearly three months, instead of rejecting it immediately as their
12 purported protocol of "never accepting unsolicited submissions," would have required.
13 Such evidence further supports the inference that defendants accepted plaintiff's
14 confidential submission.

15 Defendants' reliance on *Anderson v. Stallone*, 1989 WL 206431 (C.D. Cal.1989) is
16 not apposite. In *Anderson*, the Court acknowledged that breach of confidence claims are
17 not preempted by copyright law, but ruled Plaintiff had not brought a competent breach of
18 confidence claim. The plaintiff had not submitted a story idea that was novel or unique.
19 His story was based on the unauthorized use of Defendant's copyrighted "Rocky Balboa"
20 characters. *Id.*

21 In *Idema v. Dreamworks, Inc.* 162 F.Supp.2d 1129, 1185 (C.D.Cal.,2001) the
22 Court found no merit to plaintiff's claim of confidential relationship based on the
23 allegation that he had marked "confidential" on the envelope containing his submittal.
24 The court concluded that use of the word "confidential," without more, did nothing to
25 change the qualitative nature of the claim and was not sufficient, therefore, to transform
26 plaintiff's infringement claim into a breach of confidence claim. Here, Thomas has
27 alleged entrustment of her novel story to Defendants' expertise with an expressed
28 understanding that her idea had great commercial potential. It is the entrustment of a

1 novel idea, combined with permission to use upon payment, that establishes an inference
 2 of confidentiality. Thomas does not rely merely on the markings on the outside of the
 3 envelope. As held in *Idema*, breach of this confidential relationship is qualitatively
 4 different than infringement of a copyright. *Id.*

5 Similarly, *Design Art v. National Football League Properties, Inc.*, 2000 WL
 6 33151646, did not address whether Plaintiffs had established a confidential relationship.
 7 Addressing Plaintiff's allegation that Defendants had breached an "implied obligation"
 8 not to convert Plaintiff's ideas, the Court found that breach of an implied promise not to
 9 use is no different than an infringement claim. On the other hand, the Plaintiff at bar
 10 alleges more than simply breach of an implied obligation not to copy. She alleges breach
 11 of a confidential relationship by defendants' use of her novel work knowing they do not
 12 have permission to do so without payment, while at the same time claiming to reject it.
 13 These facts are lights years away from those in *Design Art*.

14 **VI. THOMAS' UNFAIR COMPETITION CLAIM HAS BEEN TIMELY** 15 **BROUGHT WITHIN THE FOUR-YEAR LIMITATIONS PERIOD**

16 A cause of action for unfair competition must be brought within four years of
 17 accrual pursuant to Business and Professions Code § 17208. Thomas became aware that
 18 Defendants had engaged in their unlawful, unfair and fraudulent business practices when
 19 she saw the movie, "Finding Nemo" on June 6, 2003, and learned that Defendants had
 20 incorporated her story "Squisher the Fish," into the movie. (*See* FAC ¶ 27). Thomas'
 21 allegations here must be accepted as true and cannot be resolved by controverted facts.
 22 Thus, Thomas' Complaint, filed on May 29, 2007, is within the four-year limitations
 23 period of Business and Professions Code § 17208. Even if Thomas were charged with
 24 constructive notice of Defendants' unlawful business practices as of the date of the
 25 theatrical release of the movie on May 29, 2003, she is still within the four year
 26 limitations period.

27 Defendants' argument that Plaintiff "should have known" of their misconduct
 28 earlier than the initial release date is frivolous, without foundation and a matter of factual

1 dispute at best. Such factual questions cannot be resolved in this motion to dismiss. *See*
 2 *Firoozye v. Earthlink Network*, 153 F.Supp.2d 1115, 1119 (N.D. CA 2001)("The Court
 3 must take the non-moving party's factual allegations as true and must construe those
 4 allegations in the light most favorable to the non-moving party."); *see also Polar Bear*,
 5 384 F.3d at 707 (date of discovery of a cause of action is a question of fact.)

6 Moreover, the mere existence of publications surrounding the future release of a
 7 movie entitled "Finding Nemo" is incompetent to charge Thomas with constructive
 8 knowledge that Defendants had copied her Squisher story to make the movie. To charge
 9 Plaintiff with knowledge of news releases concerning the future release of a movie, it
 10 must first be shown: (1) that Plaintiff read the publications in which the press releases
 11 appeared or is likely to have read them. and (2) that the press releases contained sufficient
 12 detail of story line, description of characters and dialogue to cause Plaintiff or a
 13 reasonable person to realize that the movie incorporated Plaintiff's work. None of these
 14 foundational facts has been established, nor can they be. *See Polar Bear Productions*,
 15 384 F.3d at 706.

16 Before the movie's release and Plaintiff's viewing thereof, it is unreasonable to
 17 charge Thomas with the duty of scouring trade papers or conducting searches on Westlaw
 18 (as counsel has done in support of Defendants' motion to dismiss) to see if anyone has
 19 stolen her story, especially in view of Defendants' misrepresentation that they had rejected
 20 her story. It is also unreasonable to expect Thomas to discover that she had an actionable
 21 wrong from news articles that mention a future movie bearing a different title than her
 22 story and that do not describe the movie in sufficient detail to alert her or a reasonable
 23 person that the movie incorporated her story. In fact, most of the articles cited by
 24 Defendants do no more than briefly mention the future release of the movie with scant or
 25 no discussion of plot. (*See Decl. of A. Roberts, Exh. A, B, C, D.*)

26 It is also unreasonable to assume that Thomas should have discovered she had an
 27 actionable wrong from the movie's Hollywood pre-release to a few celebrities. (*See Decl.*
 28

1 of A. Roberts, Exh. E, F, G). Thomas is a member of the general public and did not
 2 attend the Hollywood premiere.

3 None of the disputed facts Defendants seek to introduce establish that Plaintiff is
 4 untimely in her unfair competition claim.

5 VII. CONCLUSION

6 Defendants' motion to dismiss must be denied because plaintiff properly states a
 7 cause of action for copyright infringement and unfair competition. Defendants'
 8 infringement of Thomas' copyright has been continuous and on-going and she can recover
 9 for all continuing wrongs within the three years prior to suit. Thomas' story is original
 10 and unique and there are overwhelming similarities between her story and Defendants'
 11 film. Finally, Thomas' unfair competition claim is timely and cannot be preempted
 12 because it is based on a breach of confidence that is qualitatively different than a
 13 copyright infringement claim.

14 Dated: January 10, 2008

15 ROBINSON & WOOD, INC.

16
 17 By /s/
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